IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 776 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

SANDHI SIDIK KASAMBHAI

Appearance:

1. Criminal Appeal No. 776 of 1992

MR BY MANKAD APP for Petitioner No. 1

MR JM BUDDHBHATTI FOR HH PATEL for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 10/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

#. The State has by preferring this appeal under Section 378 of the Criminal Procedure Code (for short "Cr.P.C.") challenged the judgement of acquittal dated 20th June, 1992 rendered by Additional Sessions Judge, Rajkot in

Sessions Case No. 96 of 1989, by which, the present respondent has been acquitted from the charge of offence punishable under Section 8 read with Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

#. The facts leading to the present acquittal appeal in nutshell are as follows :-

2.1 On or about 19.2.1987 at about 17-00 hours, the complainant Shri S.M. Shah was P.S.I. of Paddhari Police Station in company of Head Constable Shri M.R. Gohil and K.B. Zala, was on Patrolling for checking of vehicles, in which, unauthorised passengers were being illegally carried for their journey. For this duty, they were present there on Rajkot High Way road. At about 17.30 hours, one Chhakdo (a big rickshaw) bearing No. GRP-5360 loaded with three bags of Sugar and driven by Bhupat Shukhlal Luvana resident of Padadhari came from Rajkot side. That Rickshaw was made to halt by the complainant. It was found that rickshaw was loaded with bags of sugar and on that bags one Sindhi Siddiki Kasam of village Paddhari (present respondent) was found sitting. On making search of his person, it was found that there was a "Charas" weighing "4 (four) aani Bhar" (i.e. about one gram) wrapped in plastic paper, which was placed in pocket inside waist portion of pent warn by him. It was also found that in the pocket on other side, there was one CHALAM (An earthen pipe used for smoking purpose) and one piece of red cloth. The complainant called two panch witnesses and in presence of that panch witnesses that "Charas" and other articles were seized from the respondent under a panchnama. That article "Charas" was properly packed and duly sealed as per the procedure prescribed. Immediately, thereafter, Shri S.M. Shah lodged his complaint in Padadhari Police Station. It came to be registered as CR No. Pro.4/87 at 20.30 hours on 19.2.1987. That complaint was given for specific offence punishable under Section 66 (B) of the Bombay Prohibition Act. That offence registered pursuant to the complaint lodged by complainant Shri S.M. Shah was thereafter, entrusted to one Mahavir R. Gohil, Head Constable for further investigation. He conducted the investigation and ultimately, he filed chargesheet against the respondent in the Court of the learned Chief Judicial Magistrate, Rajkot on or about 22nd September, 1987. That chargesheet was filed for an offence under Section 66 (B) of the Bombay Prohibition Act.

2.2 Then on 22nd June, 1989, the learned APP, who appeared before the Court of the learned Chief Judicial

Magistrate, Rajkot submitted an application Ex. 3 in Criminal Case No. 3398 of 1987 requesting the court to commit the case to the Court of Sessions at Rajkot as the offence against the respondent was punishable under Section 20 of the NDPS Act. After hearing the learned advocates for both the parties, the learned Chief Judicial Magistrate, Rajkot passed a committal order on 29th July, 1989 and committed the case to the Court of Sessions, Rajkot and pursuant to that order, the case was committed against the respondent in the court of Sessions at Rajkot and that case came to be registered as Sessions Case No. 96 of 1989.

#. The learned Additional Sessions Judge framed the charge at Ex. 1 against the respondent, on 15th May, 1992. That charge was framed for an offence punishable under Section 20 read with Section 8 of the NDPS Act. On recording plea of accused, he pleaded not guilty to the charge and claimed to be tried and therefore, the prosecution examined five witnesses. The prosecution has also produced about five documents in support of their case against the respondent. After hearing the learned advocates for both the parties and after appreciating the evidence led by the prosecution, the learned Judge of the Trail Court found that the prosecution has failed to prove the case against the accused for which, charge has been framed and on coming to this conclusion, he rendered his judgement Ex.20 on 20th June, 1992, by which, he acquitted the respondent from the charge framed against him.

#. Being aggrieved against and dissatisfied with said judgement of acquittal, the State has preferred this present appeal under Section 378 of Cr.P.C.

#. We have heard Mr. B.Y. Mankad, learned APP for the appellant - State and Mr. J.M. Buddhbhatti, learned advocate for and on behalf of Mr. H.H. Patel, learned advocate for the respondent. Shri Mankad, learned APP has taken us through the oral as well as documentary evidence led by prosecution in the trial Court together with impugned judgement. Shri Mankad, learned APP has argued that the learned Judge of the Trial Court has not appreciated the evidence in its correct prospective and he ought to have held the respondent guilty for the offences, for which, charge has been framed. Shri Buddhbhatti, learned advocate for the respondent has argued that in this case, most important witness i.e. the complainant has not been examined by the prosecution and that the report of Forensic Science Laboratory (for short "F.S.L.") which is relied on by the trial Court is

merely an opinion without having any basis of any finding, as a result of carrying out necessary tests, that opinion is given and therefore, that opinion cannot be admitted as an evidence in the case. He has supported the judgement of acquittal rendered in favour of the respondent.

#. We have considered the submissions made by learned advocates for both the parties. We have reappreciated the evidence led by the prosecution in the Trial Court. From the papers, it appear that from the very beginning the case was filed against the respondent for an offence punishable under Section 66 (B) of the Bombay Prohibition Act but as a result of an application having been given by learned APP before the learned Chief Judicial Magistrate, Rajkot the case came to be committed to the Court of Sessions, Rajkot. As the charge has been framed against the respondent for an offence punishable under Section 20 read with Section 8 of the NDPS Act, we have to consider whether the provisions of the NDPS Act are fully complied with or not. Here in this case, it appears from the evidence that Investigating Officer, who was very much present when the search was made has deposed that first search was made and thereafter, panch witnesses were called. As per the provisions of Section 100 of the Cr.P.C., when search is to be made, first panch witnesses are to be called upon and thereafter, search is to be made and therefore, there is non compliance of Sub-section 4 of Section 100 of Cr.P.C.

As the case is under the NDPS Act and when the search was made of a "person" of respondent, the complainant was legally duty bound to follow the provisions of Section 50 of the Act immediately, after he found that the respondent was having a narcotic substance. In case of STATE OF PUNJAB VS. BALBIR SINGH, reported in (1994) 3 Supreme Court Cases 299, the Apex Court has held as under:-

> "If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then

> the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

In this case, the complainant S.M.Shah was a P.S.I. and therefore, he was not an authorised officer under Section 42 of the Act. He was required to inform immediately to his superior officer. He has also not informed the respondent for his right to be searched in presence of either Gazetted Officer or Magistrate and therefore, in this case, there is a clear cut violation of Section 50 of the NDPS Act and on this only ground, this appeal deserves to be dismissed.

#. Still however, we have heard the arguments of Shri Buddhbhatti, learned advocate for the respondent that prosecution cannot rely upon the report Ex.10, which is issued by the Senior FSL Officer. It is surprising that the said report is given just below an acknowledgment receipt addressed to P.I.. No separate report with regard to examination of substance, is produced by the prosecution. Shri Buddhbhatti, learned advocate for the respondent has contended that the officer of the FSL is required to carry out three tests namely (i) Physical test (ii) Chemical Test and (iii) Botanical test and thereafter, he can give his opinion as to whether particular substance is a narcotic substance or not. Here in this case, Ex. 10 is an opinion without any data with regard to tests carried out by the FSL. In support of his submission, he has cited two authorities (i) MAHMAD HANIF SHAIKH IBRAHIM VS. STATE OF GUJARAT, reported in 1994 (2) GLR, 1191 and another of AMRABHAI RANCHHODBHAI BHARWAD VS. STATE OF GUJARAT, reported in 2001 (2) GLR, 1439. These two authorities are of Division Bench of this Court. In view of the legal position settled by this Court, report Ex.10 cannot be considered as an expert opinion under Section 45 of Indian Evidence Act in absence of results of each test carried out by Scientific Officer of FSL. There is no evidence to show that particular article seized from the respondent was a "Charas" and therefore, the prosecution has miserably failed to establish the case against the respondent.

#. Under the circumstances, the learned Trial Judge of the Trial Court has rightly rendered the judgment of

acquittal. We find no reason to interfere with the findings arrived at by the learned Trial Judge of the Sessions Court, Rajkot.

#. In view of above discussion, acquittal appeal filed by the State is dismissed. The order of acquittal passed by Additional Sessions Judge, Rajkot dated 20.6.1992 in Sessions Case No. 96 of 1989 acquitting the accused for the offences punishable under the NDPS Act is hereby confirmed. Bail bond furnished by respondent-accused is accordingly cancelled.

Date : 10.7.2002 (D.K.Trivedi, J.)

(H.H. Metha, J.)
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